MUHAMMAD AMMAR HARON v. SHARIFAH ZAHIDAH SYED NOOH & ORS

HIGH COURT MALAYA, SHAH ALAM
CHOONG YEOW CHOY JC
[CIVIL SUIT NO: BA-22NCvC-135-04-2023]
23 OCTOBER 2024

Abstract – *While an unless order is a common tool to enforce compliance with court orders, it is not a prerequisite for a court to exercise its discretion to strike out a claim under O. 34 r. 2(3) of the Rules of Court 2012 for non-compliance with pre-trial case management directions.*

CIVIL PROCEDURE: *Case management – Directions of court – Non-compliance and flouting of pre-trial case management directions issued by court – Whether unless order required with regard to pre-trial case management directions – Whether claim ought to be struck out – Whether appropriate case for court to exercise discretion to strike out claim – Whether adjournment ought to be allowed – Rules of Court 2012, O. 34 r. 2(3)*

CIVIL PROCEDURE: *Striking out – Application for – Non-compliance and flouting of pre-trial case management directions issued by court – Whether claim ought to be struck out – Whether appropriate case for court to exercise discretion to strike out claim – Rules of Court 2012, O. 34 r. 2(3)*

At the first pre-trial case management, parties were directed to file the following documents by 30 June 2023: (ii) bundle of pleadings; (ii) statements of the agreed facts; (iii) summary of the plaintiff's and the defendants' respective cases; (iv) issues to be tried; (v) common bundle of documents; and (vi) the plaintiff's and the defendants' list of witnesses. The defendants filed their case summary and list of witnesses while the plaintiff did not file any of the documents. At the following pre-trial case management, the plaintiff sought additional time to file the common bundle of documents. Parties were then directed to comply with the court's directions and to file the pre-trial case management documents before the next pre-trial case management, on 28 July 2023. The plaintiff filed the necessary documents. Parties were then directed to file their witness statements by 5 July 2024. Both the plaintiff and the defendants failed to file their witness statements. It was only on 1 August 2024 that the plaintiff filed and served three of his witness statements and 15 additional documents. The defendants, on the other hand, filed and served their witness statements on 5 August 2024. Hence, the present application by the defendants, to strike out the plaintiff's claim, pursuant to O. 34 r. 2(3) of the Rules of Court 2012 ('ROC'), on the grounds that the plaintiff: (i) did not comply with the pre-trial case

management direction issued on 31 May 2023 by failing to file any pre-trial case management documents by 30 June 2023; (ii) flouted the pre-trial case management direction issued on 28 July 2023 to file his witness statements by 5 July 2024; and (iii) 'ambushed' the defendants by filing and serving his witness statements and the 15 additional documents on the defendants three days before the commencement of the trial. Resisting the defendants' application, the plaintiff argued that: (i) no unless order was made by the court with regard to the pre-trial case management directions; (ii) the striking out of the plaintiff's claim was a drastic exercise of discretion under O. 34 r. 2(3); (iii) apart from the non-compliances of the pre-trial case management directions, there was no other record of the plaintiff not having complied with the court's orders; and (iv) the defendants too, by not filing their witness statements by 5 July 2024, had flouted the pre-trial case management directions on 28 July 2023. The issues that arose for adjudication were: (i) whether the court was empowered to strike out the plaintiff's claim pursuant to O. 34 r. 2(3) despite the absence of an unless order; and (ii) whether this was an appropriate case for the court to exercise its discretion, pursuant to O. 34 r. 2(3), to strike out the plaintiff's claim or, alternatively, to allow an adjournment sought by the plaintiff.

Held (dismissing application by defendants; allowing adjournment sought by plaintiff):

(1) An unless order is an order of the court that directs a party to perform some process requirements by a specified date and states the consequences of transgression. In the present case, no unless order was made against the pre-trial case management directions given on 31 May 2023 and 28 July 2023. As a result, the plaintiff took the opportunity to suggest that without an unless order, the plaintiff's non-conformity with the pre-trial case management should, therefore, not be subjected to a striking out under O. 34 r. 2(3) of the ROC. The plaintiff's odd insinuation was confounding as the plaintiff had initially accepted that O. 34 r. 2(3) vests the courts with the discretionary power to strike out any claim for non-compliance of orders. More ironically, there was an entire line of authorities that made it clear that the courts can strike out a party's claim for non-compliance of pre-trial case management directions even in the absence of an unless order. The legal position is that the presence or absence of an unless order is not, in itself, a fetter to the court's discretion to strike out a party's claim for non-compliance of pre-trial case management directions under O. 34 r. 2(3). This works both ways, even in circumstances where there is a non-compliance of an unless order. Although the ordinary result for non-compliance of an unless order is that the sanction of the order will be imposed, the said sanction may be avoided if the non-compliance is due to extraneous circumstances or something beyond the non-complying party's control. (paras 28-30, 35 & 36)

(2) Although the progression of the present case had, to a large extent, been affected by the conduct of both parties, the present case was not 'sufficiently serious to defeat the purpose' of the pre-trial case management direction given so as to warrant the court to exercise its discretion under O. 34 r. 2(3) of the ROC to strike out the plaintiff's claim. The plaintiff need not bear the full brunt of the law. It was only appropriate that he was penalised as to costs. The plaintiff was ordered to pay costs thrown away of RM6,000 to the defendant, subject to allocatur. (paras 49, 50 & 52)

Case(s) referred to:

Aikbee Timbers (Sarawak) Sdn Bhd v. Solid Timber Sdn Bhd [2020] AMEJ 1272 ***(refd)***
Dr Sim Kui Hian v. Chong Chieng Jen & Other Appeals [2021] 6 CLJ 305 CA ***(refd)***
Faisal Hj Siraj & Anor v. Ahmad Zaki Sendirian Berhad & Ors [2020] CLJU 105; [2020] 1 LNS 105 HC ***(refd)***
Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor [2010] 3 CLJ 550 CA ***(refd)***
Ho Woon Kong & Ors v. Potensi Mestika Construction Sdn Bhd & Anor [2024] CLJU 338 HC ***(refd)***
Hong Leong Assurance Bhd v. American Home Assurance Company-Malaysia [2008] CLJU 141; [2008] 1 LNS 141 HC ***(refd)***
How Hock Sing v. Lee Say Peng & Ors [2015] 9 CLJ 368 HC ***(refd)***
Hytec Information Systems Ltd v. Coventry City Council [1997] 1 WLR 1666 ***(refd)***
Ineax Engineering Sdn Bhd v. Ineax Process Sdn Bhd; Ng Wee Keat (Third Party) [2017] CLJU 1187; [2017] 1 LNS 1187 HC ***(refd)***
Koh Heng Jin v. Gan Kooi Ann [2015] CLJU 1244; [2015] 1 LNS 1244 CA ***(refd)***
Lee Kok Vun v. Aineh Binsin [2021] CLJU 1583; [2021] 1 LNS 1583 HC ***(refd)***
Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd [2004] 3 CLJ 88 CA ***(refd)***
Re Jokai Tea Holdings Ltd (Note) [1992] 1 WLR 1196 ***(refd)***
Ri-Yaz Hotels And Resorts Sdn Bhd v. Dynamics Capital Sdn Bhd [2022] CLJU 2610; [2022] 1 LNS 2610 HC ***(refd)***
Sunway PMI-Pile Construction Sdn Bhd v. Pembenaan Chan & Chua Sdn Bhd [2003] 5 CLJ 63 HC ***(refd)***
Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***
Tan Sri Datuk Diong Hiew King v. Lau Swee Nguong [2012] CLJU 1086; [2012] 1 LNS 1086 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 34 r. 2(2), (3)
Rules of the High Court 1980, O. 34

For the plaintiff - Fatimah Zulaikha Ahmad Bashri & Mohd Faizal Abdul Rahman; M/s Faizal Rahman & Co
For the defendants - Mohammad Hazim Mohd Yaacob; M/s Azmi & Assocs

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JUDGMENT

Choong Yeow Choy JC:

Introduction

B **[1]** Traditionally, courts have been passive participants in the pre-trial phase of the civil litigation process, only becoming actively involved when trial commences. At the pre-trial stage, courts remain largely inactive unless an interlocutory application is filed to address a specific issue. The management of proceedings has historically rested largely with the parties involved in the dispute. However, the advent of modern case management C practices has introduced a more proactive approach, with courts now striving to ensure the efficient administration of justice. This proactive role becomes particularly significant when parties fail to comply with pre-trial case management directions.

D **[2]** In the current case, this court faced such a situation. In resolving the present application by the defendant to strike out the plaintiff's claim for flouting pre-trial case management directions issued by this court, this court had to carefully consider several key factors, including the need to enforce procedural discipline, the importance of addressing the substantive merits of the case, and the appropriate exercise of judicial discretion.

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The Principal Issues

[3] In summary, there were two principal issues before the court.

[4] The first was whether this court was empowered to strike out the plaintiff's claim pursuant to O. 34 r. 2(3) of the Rules of Court 2012 despite F the absence of an unless order.

[5] If the answer to the above were in the affirmative, the ensuing issue was whether this was an appropriate case for this court to exercise its discretion under O. 34 r. 2(3) of the Rules of Court 2012 to strike out the plaintiff's claim or alternatively to allow an adjournment sought by the G plaintiff.

The Pertinent Background Facts

[6] At the first pre-trial case management on 31 May 2023, this court had directed parties to file the following documents by 30 June 2023:

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(i) bundle of pleadings;

(ii) statements of the agreed facts;

(iii) summary of the plaintiff's and the defendants' respective cases;

I (iv) issues to be tried;

(v) common bundle of documents; and

(vi) the plaintiff's and defendants' lists of witnesses.

[7] The plaintiff did not file any of the documents by the said date (plaintiff's first non-conformity of pre-trial case management directions); whereas the defendants had filed their case summary and list of witnesses on 30 June 2023.

[8] At the following pre-trial case management on 3 July 2023, the plaintiff sought additional time to file the common bundle of documents. The court then directed parties to comply with its directions and to file the pre-trial case management documents before the next pre-trial case management on 28 July 2023.

[9] The plaintiff had filed the bundle of pleadings, the statements of agreed facts, the issues to be tried, his case summary and the common bundle of documents on 21 July 2023. On 25 July 2023, the plaintiff further filed his list of witnesses.

[10] Moving forward to the pre-trial case management on 28 July 2023, the court directed parties to file their witness statements by 5 July 2024, that is, one month before the trial date (trial dates were fixed to take place from 5 to 8 August 2024).

[11] Both the plaintiff and the defendants failed to file their witness statements as directed by this court (plaintiff's second non-conformity of pre-trial case management directions; defendants' first non-conformity of pre-trial case management directions).

[12] It was only on 1 August 2024 that the plaintiff filed and served three of his witness statements and 15 additional documents.

[13] Although the defendants had also filed and served their witness statements, they only did so on 5 August 2024.

[14] As a result of the above, the defendants raised an objection against the plaintiff's act of non-conforming with the court's pre-trial case management directions relating to the filing of witness statements on the first day of trial, that is, on 5 August 2024. The defendants further argued that the filing of the 15 additional documents were made without leave of the court and without notice to the defendants' solicitors. This led to the defendants' application before this court to seek an order to strike out the plaintiff's claim.

The Respective Contentions

[15] The crux of parties' submissions was as follows.

[16] The defendants sought for an order to strike out the plaintiff's action pursuant to O. 34 r. 2(3) of the Rules of Court 2012 on basis that:

(i) the plaintiff did not comply with the pre-trial case management directions issued on 31 May 2023 by failing to file any pre-trial case management documents by 30 June 2023;

(ii) the plaintiff flouted the pre-trial case management directions issued on 28 July 2023 to file his witness statements by 5 July 2024; and

(iii) the plaintiff "ambushed" the defendants by filing and serving his witness statements and the 15 additional documents on the defendants' solicitors three days before the commencement of trial.

[17] The plaintiff sought to resist the defendants' application on the following grounds, namely:

(i) no unless order was made by the court with regard to the pre-trial case management directions;

(ii) the striking out of the plaintiff's claim is a drastic exercise of discretion under O. 34 r. 2(3) of the Rules of Court 2012;

(iii) apart from the non-compliances of the above pre-trial case management directions, there was no other record of the plaintiff not having complied with this court's orders; and

(iv) the defendants, by not filing their witness statements by 5 July 2024, too had flouted the pre-trial case management directions of 28 July 2023.

[18] While this court commended the parties for submitting their written submissions over a very short notice (by the following day), it remarked that if only parties had demonstrated similar diligence throughout the pre-trial stage, the trial would have taken off on 5 August 2024 as scheduled, and this court would not have been required to consider the present application by the defendants to invoke O. 34 r. 2(3) of the Rules of Court 2012.

The Applicable Principles Relating To Order 34 Rule 2(3)

[19] It is trite law, and as conceded by both parties, that courts are conferred with the discretionary power to strike out a party's claim for non-conformity with case management directions under O. 34 r. 2(3) of the Rules of Court 2012.

[20] This is expressly provided in O. 34 r. 2(3) of the Rules of Court 2012, which stipulates as follows:

> The court, having given directions under rule 2(2) or rule 3 may either on its own motion or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it thinks fit.

[21] The rationale behind O. 34 r. 2(3) of the Rules of Court 2012 is alluded to in O. 34 r. 2(2) of the Rules of Court 2012, which provides that the existence of O. 34 r. 2 of the Rules of Court 2012 is to enable courts " ... to secure the just, expeditious and economical disposal of the action or proceedings."

[22] Additionally, our courts have reiterated the judicial discretion underlying O. 34 r. 2(3) of the Rules of Court 2012 on many occasions. For instance, the Court of Appeal in *Koh Heng Jin v. Gan Kooi Ann* [2015] CLJU 1244; [2015] 1 LNS 1244; [2016] AMEJ 0039; [2015] MLJU 2242; [2015] MLRAU 403 ("*Koh Heng Jin*") explained that:

> [40] In our view even though the learned judge did not issue an "unless order", O. 34 r. 2(2) of the ROC (not O. 34 r. 1 as cited by counsel) clearly contemplates that orders and directions issued by the court during pre-trial case management are peremptory in nature as O. 34 r. (3) of the ROC confers on the court the power to, *inter alia*, strike out a party's claim either on its own motion or upon the application of any party, in the event that such party defaults in complying with any order and/or directive issued by the court under the said O. 34 r. 2(2).

[23] Likewise, the High Court in *Tan Sri Datuk Diong Hiew King v. Lau Swee Nguong* [2012] CLJU 1086; [2012] 1 LNS 1086; [2014] 8 MLJ 575; [2012] MLRHU 1785 ("*Tan Sri Datuk Diong Hiew King*") held that:

> [48] Rule 2 of the Order deals with pre-trial case management which is directed by the court. It encompasses a very wide range of matters which the court can consider including the appropriate orders and directions that should be made by the court to secure the just, expeditious and economical disposal of the action or proceedings. ...

[24] More factually pertinent to the present case, the High Court in *Ri-Yaz Hotels And Resorts Sdn Bhd v. Dynamics Capital Sdn Bhd* [2022] CLJU 2610; [2022] 1 LNS 2610; [2023] 1 AMR 142; [2022] MLJU 2762; [2022] MLRHU 2319 stressed on the availability of this discretion in the context of a party's non-compliance with pre-trial case management directions to file witness statements:

> [23] ... it is clear that Order 34 rule 2(3) of ROC 2012 provides a discretionary power to the Court, *inter alia*, to strike out the defence and counterclaim and to enter judgment if the defendant has defaulted in complying with any directions given by the court under Order 34 rule 2(2) of ROC 2012 which includes for the parties to exchange and file witness statements of all witnesses who may give evidence at the trial.

[25] That said, even prior to the introduction of the Rules of Court 2012, the courts had always possessed the discretion to strike out a party's claim for non-conformity with case management directions. Su Geok Yiam J recognises this in Her Ladyship's judgment in *Tan Sri Datuk Diong Hiew King* at para. [45] where she observed that O. 34 of the Rules of Court 2012 is similar to the repealed O. 34 of the Rules of the High Court 1980.

[26] The clear recognition of such a discretionary power prior to the coming into force of the Rules of Court 2012 can be found in *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88; [2004] 4 AME 449; [2004] 4 MLJ 446; [2004] 1 MLRA 702, where it was held that:

A [13] Order 34 r. 7 provides for the discretionary power of the judge to make such order against the defaulting party 'as meets the ends of justice' should any party fail to comply with any direction given by the judge at any pre-trial case management conference.

[27] Similarly, in *Sunway PMI-Pile Construction Sdn Bhd v. Pembenaan Chan* B *& Chua Sdn Bhd* [2003] 5 CLJ 63; [2001] AMEJ 0281; [2002] 7 MLJ 538; [2001] 5 MLRH 665, the High Court noted that:

Pursuant to r. 3(1) 'the judge may in his absolute discretion make any order as meets the ends of justice, including striking to the action or any defence or counterclaim, or other pleading or entering judgment against C the defendant ...'. Similarly, as O. 34 r. 7 of the RHC also empowers the judge to make such order against the defaulting party as meets the ends of justice, it cannot be gainsaid that the power to be exercised pursuant thereto must include a power to order that the defence and counterclaim herein be dismissed ...

D **Application Of The Principle To The Present Application**

Issue 1: Whether This Court Is Empowered To Strike Out The Plaintiff's Claim Pursuant To Order 34 Rule 2(3) Of The Rules Of Court 2012 Despite The Absence Of An Unless Order?

[28] As explained by Mohd Nazlan JC in *How Hock Sing v. Lee Say Peng* E *& Ors* [2015] 9 CLJ 368; [2015] 6 AMR 381; [2015] MLJU 712; [2015] MLRHU 856 ("*How Hock Sing*"), an unless order "is an order of the court that directs a party to perform some process requirement by a specified date and states the consequences of transgression".

F **[29]** In this present case, no unless order was made against the pre-trial case management directions given on 31 May 2023 and 28 July 2023. As a result, the plaintiff took the opportunity to suggest in his argument that without an unless order, the plaintiff's non-conformity with the pre-trial case management directions should therefore not be subjected to a striking out under O. 34 r. 2(3) of the Rules of Court 2012.

G **[30]** This court is confounded by this odd insinuation as the plaintiff had initially accepted that O. 34 r. 2(3) of the Rules of Court 2012 vests the courts with the discretionary power to strike out any claim for non-compliance of orders. More ironically, there is an entire line of authorities that made clear that courts can strike out a party's claim for non-compliance of pre-trial case H management directions even in the absence of an unless order. The plaintiff had conveniently not made any reference to these authorities.

[31] An example would be *Koh Heng Jin,* where the Court of Appeal made clear:

I [40] In our view even though the learned judge did not issue an "unless order", O. 34 r. 2(2) of the ROC ... clearly contemplates that orders and directions issued by the court during pre-trial case management are peremptory in nature as O. 34 r. (3) of the ROC confers on the court the

> power to, *inter alia*, strike out a party's claim either on its own motion or upon the application of any party, in the event that such party defaults in complying with any order and/or directive issued by the court under the said O. 34 r. 2(2).

[32] Additionally, this court is aware of the case of *Ineax Engineering Sdn Bhd v. Ineax Process Sdn Bhd; Ng Wee Keat (Third Party)* [2017] CLJU 1187; [2017] 1 LNS 1187; [2017] AMEJ 0478; [2017] MLJU 543; [2017] MLRHU 810 ("*Ineax Engineering*"), where the High Court remarked as follows:

> [26] At any rate, what is important to note is that under Order 34, the powers of the court to dismiss an action are not confined to situations where an 'unless order' has been made and not complied with.

[33] In *Faisal Hj Siraj & Anor v. Ahmad Zaki Sendirian Berhad & Ors* [2020] CLJU 105; [2020] 1 LNS 105; [2020] AMEJ 0050; [2020] MLJU 108 ("*Faisal Hj Siraj*"), when considering whether to exercise the court's discretion under O. 34 r. 2(3) of the Rules of Court 2012, the High Court held that:

> [10] The plaintiff's counsel to my mind could have informed or notified the court that he needed more time particularly so if it was true that he was seeking treatment for the past two months. But he chose to wait until the day of hearing to do so. The pre-trial directions were given on 21.5.2019. The plaintiff's counsel had about five months to comply with the said directions before the hearing. And I do not think that such discretion can be exercised only if I had made an unless order as the provision does not say so and I do not think I should read the words "unless order" into the said sub-rule.

[34] This court is also cognisant of the authorities cited by the defendants, namely, *Sunway PMI-Pile Construction Sdn Bhd v. Pembenaan Chan & Chua Sdn Bhd* [2003] 5 CLJ 63; [2001] AMEJ 0281; [2002] 7 MLJ 538; [2001] 5 MLRH 665 ("*Sunway PMI-Pile*") and *Hong Leong Assurance Bhd v. American Home Assurance Company-Malaysia* [2008] CLJU 141; [2008] 1 LNS 141; [2008] 8 MLJ 547; [2008] 4 MLRH 840 (*'Hong Leong Assurance Bhd*'), which illustrate instances where courts have struck out parties' claim for flouting courts' orders, notwithstanding the absence of an unless order.

[35] The legal position is that the presence or absence of an unless order is not in itself a fetter to the court's discretion to strike out a party's claim for non-compliance of pre-trial case management directions under O. 34 r. 2(3) of the Rules of Court 2012.

[36] This works both ways, even in circumstances where there is a non-compliance of an unless order. Although the ordinary result for non-compliance of an unless order is that the sanction of the order will be imposed, the said sanction may be avoided if the non-compliance was due to extraneous circumstances or something beyond the non-complying party's

control (see for example, *Lee Kok Vun v. Aineh Binsin* [2021] CLJU 1583; [2021] 1 LNS 1583; [2021] AMEJ 1630; [2021] MLJU 3094; [2021] MLRHU 1515 at paras. [21] - [23]; *Hytec Information Systems Ltd v. Coventry City Council* [1997] 1 WLR 1666; *Re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196).

[37] A theoretical example of circumstances beyond the non-complying party's control could be if the non-compliance with an unless order occurred due to the sudden serious illness suffered by the party or the party's counsel. But it is important to note that, in such situations, the non-complying party's legal representatives should undertake their best endeavours to notify the court about the said circumstances or to make alternative arrangements (see *Faisal Hj Siraj & Anor* and *Aikbee Timbers (Sarawak) Sdn Bhd v. Solid Timber Sdn Bhd* [2020] AMEJ 1272; [2020] MLJU 1596; [2020] MLRHU 1320).

[38] In the upshot, on issue 1, this court agrees with the defendants' position that it can strike out the plaintiff's claim under O. 34 r. 2(3) of the Rules of Court 2012 for non-compliance of the pre-trial case management directions notwithstanding the absence of an unless order. As noted, the presence or absence of an unless order does not fetter nor circumvent a court's discretion under O. 34 r. 2(3) of the Rules of Court 2012.

Issue 2: Whether This Is An Appropriate Case For This Court To Exercise Its Discretion Under Order 34 Rule 2(3) Of The Rules Of Court 2012 To Strike Out The Plaintiff's Claim Or To Allow An Adjournment Sought By The Plaintiff?

[39] The court will now consider whether this is an appropriate case to exercise its discretion under O. 34 r. 2(3) of the Rules of Court 2012 to strike out the plaintiff's claim due to the non-compliance of pre-trial case management directions or to allow an adjournment sought by the plaintiff.

[40] It goes without saying that, in assessing the said appropriateness, courts are required to undertake a factual assessment of the present case. As noted in *How Hock Sing*:

> [28] ... in determining whether the consequence of dismissal of the action under O. 34 r. 2(3) is justified ... each case must be decided on its own facts.

[41] The High Court in *How Hock Sing* at paras. [27] to [29] highlighted a number of 'key considerations' to be taken into account in assessing the appropriateness of exercising the court's discretion under O. 34 r. 2(3) of the Rules of Court 2012 and these include:

(i) whether the failure to comply was intentional and contumelious;

(ii) whether there is a history of failure to comply with other orders;

(iii) whether the (applicant) contributed to the failure by the (respondent);

(iv) whether the (respondent) had made positive efforts to comply but was prevented from doing so by extraneous circumstances;

(v) whether there is prejudice to the non-defaulting party; and

(vi) whether the dismissal is proportionate to the failure to comply.

[42] Since an assessment of the appropriateness of exercising the discretion under O. 34 r. 2(3) of the Rules of Court 2012 requires a holistic factual assessment, this court is of the view that the 'key considerations' highlighted in *How Hock Sing* are not exhaustive; other germane factors could also be considered by the courts.

[43] The defendants' position on this issue is that this case is an appropriate case for the court to exercise its discretion under O. 34 r. 2(3) of the Rules of Court 2012 to strike out the plaintiff's claim due to the plaintiff's non-compliance of the pre-trial case management directions. The defendants relied on authorities which emphasised the need for procedural discipline, that is, decisions where order to strike out were made based on parties' non-compliance with court orders, namely, *Sunway PMI-Pile, Hong Leong Assurance Bhd* and *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 AMR 1; [2013] 1 MLJ 461; [2013] 1 MLRA 181.

[44] Be that as it may, while procedural discipline is important, it should be balanced with the need to ensure that cases are resolved based on their merits. (See for example the Court of Appeal's reasoning in *Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor* [2010] 3 CLJ 550; [2012] 4 AMR 45; [2010] 4 MLJ 17; [2010] 1 MLRA 68).

[45] Moreover, based on this court's own assessment of the facts and submissions by the plaintiff, there are several 'key considerations' present in this case.

[46] First, and perhaps most importantly, is that in the present case, the defendants are also not free of blame as they too had admitted that their witness statements were not filed by 5 July 2024, as directed by the pre-trial case management direction of 28 July 2023. If this court were to invoke O. 34 r. 2(3) of the Rules of Court 2012, in favour of the defendants, the defendants would have benefitted without any imposition of "penalty" against them. Having said that, the responsibility rests with the plaintiff to prosecute his claim.

[47] In addition, the consideration that apart from the plaintiff's non-compliance against the pre-trial case management directions in question, there was no record of the plaintiff having not complied with this court's orders. This further strengthens the position that this court should not exercise its discretion under O. 34 r. 2(3) of the Rules of Court 2012 (also

A contrast the present case with the recent High Court decision of *Ho Woon Kong & Ors v. Potensi Mestika Construction Sdn Bhd & Anor* [2024] CLJU 338; [2024] MLJU 401; [2024] MLRHU 227).

[48] Finally, this court is aware of the Court of Appeal's decision in *Dr Sim Kui Hian v. Chong Chieng Jen & Other Appeals* [2021] 6 CLJ 305; [2021] 4 AMR 313; [2021] MLJU 562; [2021] 4 MLRA 348, where it was held that in assessing the appropriateness of exercising the discretion under O. 34 r. 2(3) of the Rules of Court 2012:

> [34] ... unless the nature of the non-compliance is sufficiently serious to defeat the purpose of the case management directions, the drastic action of dismissing the action without warning should not be resorted to.

[49] Although the progression of the present case has, to a large extent, been affected by the conducts of both parties, this court is not convinced that the present case is "sufficiently serious to defeat the purpose" of the pre-trial case management directions given so as to warrant this court to exercise its discretion under O. 34 r. 2(3) of the Rules of Court 2012 to strike out the plaintiff's claim.

[50] This court is of the considered view that the plaintiff in the present case need not bear the full brunt of the law. However, it is only appropriate that he is penalised as to costs.

[51] Based on the above findings, this court permits the adjournment as sought by the plaintiff.

[52] Having considered the overall circumstances of the case, the plaintiff is ordered to pay costs thrown away of RM6,000 to the defendants, subject to allocatur.